Filed 2/17/09 Whittier Union High School Dist. v. Haven Construction CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WHITTIER UNION HIGH SCHOOL DISTRICT, Plaintiff and Appellant, v. HAVEN CONSTRUCTION, INC., Defendant and Respondent.	B203237 (Los Angeles County Super. Ct. No. VC045449)
INEZ OLIVA, Plaintiff and Appellant, v. HAVEN CONSTRUCTION, INC., Defendant and Respondent.	(Los Angeles County Super. Ct. No. VC046325)

APPEAL from a judgment of the Superior Court of Los Angeles County, William Birney, Jr., Judge. Reversed and remanded.

Larson & Gaston and Alisa E. Sandoval for Plaintiff and Appellant Whittier Union High School District.

Law Offices of Keith A. Bregman and Keith A. Bregman for Plaintiff and Appellant Inez Oliva.

Bistline & Cohoon, Ted H. Luymes and James B. Cohoon for Defendant and Respondent Haven Construction, Inc.

Inez Oliva and her employer Whittier Union High School District (Whittier) appeal from the judgment entered in favor of Haven Construction, Inc. (Haven) after a jury returned a special verdict finding Haven was not negligent in constructing a staircase on which Oliva fell and sustained injuries. Oliva and Whittier contend, in light of evidence the stairs had been constructed in violation of the applicable California building codes, the court erred in refusing to instruct the jury on the elements of negligence per se. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Construction Project*

Oliva worked for Whittier as a switchboard operator. In 2003 Whittier hired Haven to perform seismic retrofitting at the campus where Oliva worked. As part of that construction project, Oliva and another Whittier switchboard operator were temporarily relocated to a trailer. Whittier asked Haven to construct wooden stairs to make the trailer accessible for Oliva and others until the seismic retrofitting was complete.

Haven's superintendent of construction built four wooden steps that led from the ground to the entry door to the trailer. The wooden staircase also included wooden railings on each side, which were bolted to the trailer at the top of the staircase and further secured by three screws attached to the staircase's bottom support posts.

2. *The Accident and This Lawsuit*

In April 2004 Oliva was at the top of the stairs, holding one of the railings with her left hand. The railing gave way; and Oliva fell to the ground, sustaining substantial injuries. On October 25, 2005 Whittier sued Haven alleging negligence and seeking reimbursement for the $120,181.16 in workers' compensation benefits it had paid to

Oliva. On March 24, 2006 Oliva also sued Haven for negligence. The two cases were consolidated.

3. *Haven's Motion in Limine To Exclude Any Reference to Negligence Per Se*

Oliva's theory of the case was that Haven had constructed the stairs in violation of the California Building Code.[1] In particular, Oliva asserted the stairs as constructed violated California Building Code sections 1003.3.1.6 and 1003.3.1.6.2 (failure to provide a landing at the top of the stairs), 1003.3.3.3 (improper tread depth) and 1003.3.3.6 (improper handrail width). Prior to trial, Haven asked the court to preclude Oliva and Whittier from "offering any and all evidence, references to evidence, testimony or argument relating to the application of negligence per se to the actions of Haven, and any instruction to the jury regarding negligence per se as a permissible basis for finding a breach of the duty of care . . . ." Haven argued any violations of the building code were irrelevant because they did not cause the accident and requested an Evidence Code section 402 hearing to determine whether Oliva and Whittier could establish the elements of negligence per se as a matter of law. Oliva opposed the in limine motion, contending it was premature to rule on jury instructions and arguing a resolution of the issue should await the evidence presented at trial.

The trial court granted the motion in part, prohibiting Oliva and Whittier from mentioning the doctrine of negligence per se in opening statements, but allowing the introduction of evidence of building code violations. The court indicated it would consider a negligence per se instruction following an Evidence Code section 402 hearing if the evidence at trial warranted it.

---

1 The regulations contained in title 24, part 2 of the California Code of Regulations are published separately and known as the California Building Code. (See, e.g., *Urhausen v. Longs Drug Stores California, Inc.* (2007) 155 Cal.App.4th 254, 259, fn. 2.) Citations to the California Building Code in this opinion refer to the 2001 code in effect at the time the stairs were constructed.

4. *The Trial*

At trial Keith Miller, a physicist specializing in accident reconstruction and analysis, testified as an expert witness for Oliva and Whittier. According to Miller, the stairs had been constructed in violation of the building codes governing tread depth, handrail width and the requirement of a landing at the top of a staircase. As to the last point, he testified the lack of a landing at the top of the stairs was a significant factor in causing the accident. Had there been a landing, Miller opined, Oliva would have been able to enter the trailer without moving to her left at the top stair and leaning on the railing.[2]

Haven did not dispute that the stairs, constructed without a landing, violated the applicable building code, but contended the absence of a landing did not cause the accident. Peter Fowler, an expert in construction management, opined the accident was caused by the removal of screws securing the railing to the staircase's bottom support post. Fowler did not know what had happened to the screws, but opined, based on the absence of evidence that screws were found at the scene of the accident, that the screws had not been in place at the time Oliva was injured. (Other witnesses testified the screws were in place prior to Oliva's accident.) Haven postulated that somebody, possibly vandals, had deliberately extracted the screws from the bottom support post.

5. *The Trial Court's Denial of a Negligence Per Se Instruction*

At the close of evidence, Oliva and Whittier requested the court instruct the jury on negligence per se, arguing the instruction was supported by the evidence presented. To this end, they proffered two, alternative proposed instructions, tracking the Judicial Council of California Civil Jury Instructions (CACI) Nos. 418 and 419. The first (CACI

---

[2] As to the three building code violations to which he testified, Miller opined the absence of a landing was a significant factor in causing the accident, the improper handrail width was not a significant factor and the improper tread depth may or may not have played a role in the accident.

No. 418)[3] identified and quoted the building code provisions Oliva and Whittier contended had been violated and provided, if the jury concluded Haven had violated any of the provisions and found that such a violation was a substantial factor in causing the harm, then it must find Haven was negligent. The second proposed instruction (CACI No. 419),[4] which was identical to the first in its identification of the applicable provisions of the building code, stated the violation of the code had been established and directed the jury to decide whether the violation was a substantial factor in bringing about the harm.

The trial court refused to give either proposed instruction, stating, "I'm not going to burden the jury with a recitation of building codes that nobody can understand, and they certainly can't . . . . I'm not going to give a negligence per se. We can modify that as to the landing because clearly both experts have attested to the fact why you have a landing and both experts agree that a landing was required. So we can't just sit here and ignore the fact that there was a violation of the building code. I'm not asking you to. I'm telling you that I won't support your argument. You certainly can argue that, but I won't support it with this instruction. So, it's refused on my part."

---

3 CACI No. 418 provides: "[*Insert citation to statute, regulation, or ordinance*] states: _____ [¶] If you decide [¶] 1. That [*name of plaintiff/defendant*] violated this law and [¶] 2. That the violation was a substantial factor in bringing about the harm, [¶] then you must find that [*name of plaintiff/defendant*] was negligent [unless you also find that the violation was excused]. [¶] If you find that [*name of plaintiff/defendant*] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [*name of plaintiff/defendant*] was negligent in light of the other instructions."

4 CACI No. 419 provides: "[*Insert citation to statute, regulation, or ordinance*] states: _____. A violation of this law has been established and is not an issue for you to decide. [¶] [However, you must decide whether the violation was excused. If it was not excused, then you] [You] must decide whether the violation was a substantial factor in harming [*name of plaintiff*]. [¶] If you decide that the violation was a substantial factor, then you must find that [*name of plaintiff/defendant*] was negligent."

6. *The Trial Court's Jury Instructions*

The trial court instructed the jury on a general theory of negligence. It advised that, for Whittier and Oliva to establish their negligence claim, they must prove: "1. That Haven Group was negligent. . . . 2. [Whittier] and [Oliva] were harmed. And 3. That Haven Group's negligence was a substantial factor in causing" the harm. The court defined negligence as "a failure to use reasonable care to prevent harm to one's self or others. A person can be negligent by acting or failing to act. A person is negligent if he or she does something that a reasonably careful person would not do or failed to do something that a reasonably careful person would do. You must decide how a reasonable careful person would have acted in the same situation as the defendant Haven Group." The court also explained the term "substantial factor in causing harm is what a reasonable person would consider [to] have contributed to cause the harm. It must be more than a remote or trivial factor and does not have to be the only cause of harm. A person's negligence may combine with another factor to cause harm. If you find that Haven Group's negligence was a substantial factor in causing harm, then Haven Group is responsible for harm. Haven Group cannot avoid responsibility just because some other person, condition or event was also a substantial factor in causing harm."

7. *The Jury's Special Verdict*

In a special verdict form the jury was asked to separately decide issues of negligence, causation, damages and contributory negligence. The first question in the form directed the jury to decide whether Haven was negligent. If the answer was yes, the jury was instructed to decide whether the negligence was "a cause of injury/damage" to Oliva and Whittier. If it found Haven was not negligent, the jury was directed to sign and return the verdict form and not reach the questions of causation, damages or contributory negligence.

The jury found Haven not negligent and, as instructed, did not decide any other issue. Oliva and Whittier filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him or her which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*); *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 684 (*Bullock*); *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1107-1108.) A court may refuse a proposed instruction that incorrectly states the law or is argumentative, misleading or incomplete. (*Shaw v. Pacific Greyhound Lines* (1958) 50 Cal.2d 153, 158; see *Harris v. Oaks Shopping Center* (1999) 70 Cal.App.4th 206, 209 ["[i]rrelevant, confusing, incomplete or misleading instructions need not be given"].) Likewise, a court may refuse an instruction requested by a party when the legal point is adequately covered by other instructions given. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1189, fn. 11.)

In a civil action the court generally has no duty to rewrite an incorrect instruction or provide instructions on its own motion. (See *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1067; *Willden v. Washington Nat. Ins. Co.* (1976) 18 Cal.3d 631, 636 [unless there is complete absence of instructions on controlling law, trial court generally has no duty to instruct on own motion]; see also Code Civ. Proc., § 607a [counsel for respective parties must deliver to trial court and serve on opposing party all proposed instructions to jury covering law as disclosed by pleadings]; but see *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1159 [instruction containing "trivial inaccuracies" should have been corrected by court and given].)

When the contention on appeal is that the trial court failed to give a requested jury instruction, we review the record in the light most favorable to the party proposing the instruction to determine whether there was substantial evidence warranting the instruction. (*Soule, supra,* 8 Cal.4th at p. 572; *Bullock, supra,* 159 Cal.App.4th at p. 685.) If so, reversal is required when "'it seems probable'" the refusal to give the proposed instruction "'"prejudicially affected the verdict."' (*Soule*, at p. 580; accord *Bullock*, at p. 685; *Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1225-1226.)

2. *The Trial Court Erred in Refusing Oliva's and Whittier's Request for a Negligence Per Se Instruction*

Negligence per se, often referred to as "statutory negligence," sets the conduct prescribed by a statute, ordinance or regulation as the standard of care. (*Ramirez v. Nelson* (2008) 44 Cal.4th 908, 917-918) (*Ramirez*).) As codified in Evidence Code section 669, negligence per se is an evidentiary doctrine. That is, the violation of the statute, ordinance or regulation does not establish tort liability as a matter of law, but creates a rebuttable evidentiary presumption of negligence, provided certain prerequisites are satisfied. (*Ibid.; Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285; see also Evid. Code, § 669.) Specifically, "[t]he failure of a person to exercise due care will be presumed" if (1) the defendant violated a "statute, ordinance, or regulation of a public entity"; (2) the violation "proximately caused death or injury to person or property"; (3) the death or injury "resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent"; and (4) "the person suffering the death or the injury to his [or her] person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (Evid. Code, § 669, subd. (a); see also *Ramirez,* at pp. 917-918.)

The first two elements of negligence per se -- whether the defendant violated a statute, ordinance or regulation causing injury -- are generally considered questions for the trier of fact, while the "'"'[t]he last two elements are determined by the trial court as a matter of law, since they involve statutory interpretation. . . .'" [Citation.]'" (*Ramirez, supra,* 44 Cal.4th at p. 918; see also *Hoff v. Vacaville Unified School District* (1998) 19 Cal.4th 925, 968; *Quiroz v. Seventh Ave. Center, supra,* 140 Cal.App.4th at p. 1285.) Once established, the presumption of negligence may be rebutted by proof, among other things, that "[t]he person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (Evid. Code, § 669, subd. (b)(1).)

Here, there is no question, and, indeed, Haven does not dispute in this appeal, that the third and fourth elements of negligence per se are satisfied as a matter of law. (See

Daum v. SpineCare Medical Group (1997) 52 Cal.App.4th 1285, 1307 ["we first consider the third and fourth elements [of negligence per se] on which the court must find in the plaintiff's favor as a prerequisite to charging the jury" with a negligence per se instruction].)[5] Oliva's accident and resulting injury are of the type the California Building Code generally, and the provisions governing the construction of stairs and landings, specifically, are designed to prevent; and Oliva comes within the class of persons for whose protection the California Building Codes was adopted. (See, e.g., Cal. Build. Code, § 101.2 ["[t]he purpose of this code is to provide minimum standards to safeguard life or limb, health, property and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and structures within this jurisdiction"].)

The question, therefore, is whether there was sufficient evidence at trial of a code violation and causation to warrant giving one of the alternative, proposed negligence per se instructions. Plainly, there was: Miller testified the absence of a landing violated the California Building Code and substantially contributed to Oliva's injury. This alone was sufficient to justify a negligence per se instruction. (See, e.g., *Krusi v. S. J. Amoroso Construction Co.* (2000) 81 Cal.App.4th 995, 1000 [noting in resident's action against condominium builder, evidence construction violated applicable building code "'was sufficient to allow the case to go to the jury upon an instruction as to the negligence per se'"].)

Haven does not dispute that substantial evidence in the record supports a negligence per se instruction. Instead, it contends the court's refusal to give either of the proposed instructions was appropriate because, as written, the proffered instructions were long and confusing and referred to "irrelevant code sections." It also insists any error in

---

5 Arguing the absence of a landing was not the cause of Oliva's accident, Haven asserts Oliva does not fall within the class of persons California Building Code section 1003.3.1.6 (governing landings) is intended to protect. Causation, however, is a distinct issue, separate from whether Oliva comes within the class of persons the regulation is intended to protect. (See generally *Ramirez, supra,* 44 Cal.4th at p. 918.)

failing to give a negligence per se instruction was invited by Oliva. Neither of these arguments withstands scrutiny.

Both proposed negligence per se instructions, based on Evidence Code section 669 and following the format and language in CACI Nos. 418 and 419, quote in full the provisions of the California Building Code governing the requirement for a landing on each side of a door (Cal. Build. Code, § 1003.3.1.6).[6] Both instructions, therefore, properly (and accurately) include the regulation allegedly violated. (See, e.g., *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 548 [instructions based on violation of code provisions "should follow the wording of the particular section involved"]; *Newton v. Thomas* (1955) 137 Cal.App.2d 748, 764 [instruction quoting from Vehicle Code in negligence per se case].)

To be sure, the proposed instructions also quoted other code sections; and, as to at least one, if not both, of those provisions, there was no evidence of a causal relationship between the violation and Oliva's injury (see Evid. Code, § 669 [causal relationship between statutory violation and injury prerequisite to negligence per se]). However, the inclusion of irrelevant code provisions was not the court's reason for rejecting the instruction, nor would such a reason have been justified. Although a trial court generally has no duty to modify "improper" instructions (see *Shaw v. Pacific Greyhound Lines, supra,* 50 Cal.2d at p 158; *Bullock, supra,* 159 Cal.App.4th at p. 685), where simply

---

6 California Building Code section 1003.3.1.6 provided, "Regardless of the occupant load served, there shall be a floor landing on each side of a door. Where access for persons with disabilities is required by Chapter 11A, the floor or landing shall not be more than 1/2 inch (12.7 mm) lower than the threshold of the doorway. Where such access is not required, the threshold shall not exceed 1 inch (25 mm.). Landings shall be level except that exterior landings may have a slope not to exceed 1/4 unit vertical in 12 units horizontal (2% slope). [¶] **Exceptions:** 1. In group R, Division 3, and Group U Occupancies and within individual units of Group R, Division 1 Occupancies: [¶] 1.1 A door may open at the top step of an interior flight of stairs, provided the door does not swing over the top step. [¶] 1.2 A door may open at a landing that is not more than 8 inches (203 mm) lower than the floor level, provided the door does not swing over the landing. [¶] 1.3 Screen doors and storm doors may swing over stairs, steps or landings. [¶] 2. Doors serving building equipment rooms that are not normally occupied."

deleting the extraneous language would have eliminated any impropriety while preserving the applicable governing law, it was improper for the court to reject the instruction in its entirety. (See, e.g., *Logacz v. Limansky*, *supra*, 71 Cal.App.4th at p. 1159 [“‘“The few redundant words could have been crossed out with the stroke of a pen. . . . Such trivial inaccuracies do not justify the refusal of an instruction where the result would be to leave the jury inadequately instructed on a material issue in the case.”’”].)

Attempting to justify the trial court’s ruling, Haven insists the proposed instruction quoting California Building Code section 1003.3.1.6 (landing requirement), although accurate, was nonetheless unduly confusing. For example, as quoted in the proposed instructions, section 1003.3.1.6 contains “exceptions” for “Group R, Division 3 and Group U Occupancies,” but does not define any of those terms. Certainly, when instructions quoting a statute or regulation contain confusing or technical terms, additional instructions may be necessary to assist the jury in understanding them. (See, e.g., *People v. Estrada* (1995) 11 Cal.4th 568, 574-575 [statutory terms may require clarification when too technical, or when their statutory definition differs from common understanding].) But the need for additional clarifying instructions does not justify the refusal to give a proper instruction, required to explain a governing principle of law. Moreover, no clarification was necessary in this case. Because Haven’s violation of the code’s landing requirement was undisputed, the proposed instruction adapted from CACI No. 419 advising the jury that violation of the applicable code section “has been established and is not an issue for you to decide” would have eliminated any theoretical difficulties the jury may have had in applying the building code to the evidence presented. Rather, the jury would have been charged with deciding simply whether the violation (absence of a landing) was “a substantial factor” in causing Oliva’s injuries. (See Cal. Law Revision Com. com., 29B, pt. 2, West’s Ann. Evid. Code (1995 ed.) foll. § 669, p. 265 [“if a party admits the violation or if the evidence of the violation is undisputed, it is appropriate for the judge to instruct the jury that a violation of the

statute, ordinance, or regulation has been established as a matter of law"]; see also Use Note to CACI No. 419 [same].)

Haven alternatively urges that any error in failing to instruct the jury on negligence per se was invited by Oliva's counsel. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 ["'[w]here a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal'" on appeal]; accord, *Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 Cal.App.4th 830, 842.) Haven relies on a comment by Oliva's counsel that evidence of building code violations was pertinent to a general negligence claim even if no instruction on negligence per se was given.[7]

Haven's argument borders on the disingenuous. The statement by Oliva's counsel was made during the hearing on Haven's motion to exclude any reference to the doctrine of negligence per se. After the court ruled it would not allow Oliva to refer to negligence per se prior during the trial, Oliva's counsel argued he should be able to present evidence concerning the building code violations as part of the general negligence cause of action. Counsel's effort to present evidence of building code violations whether or not he could rely on the doctrine of negligence per se in no way "invited" the court's error in refusing to instruct the jury with CACI No. 419.

3. *The Omission of the Negligence Per Se Instruction Was Prejudicial*

The refusal of a proper instruction requires reversal only when it is probable the error prejudicially affected the verdict. (*Soule, supra,* 8 Cal.4th at pp. 580-581; *Alcala v. Vazmar Corp.* (2008) 167 Cal.App.4th 747, 755; *Bullock, supra,* 159 Cal.App.4th at

---

7 After the court ruled Oliva would be prohibited from mentioning building code violations in opening statements because that would necessitate a reference to negligence per se, Oliva's counsel argued, "But our negligence, whether it's negligence per se or negligence in the general concept, is that the defendant failed to comply with the building code . . . so I think preventing us from at least telling the jury that an expert is going to testify that there were building code violations stops us from even talking about what is the essence of our case. . . . So I understand, [I cannot] say they are negligen[t] per se. That is not what I am arguing, but I think we can argue, because if it's not negligence per se violation of the building code could still be negligence and that is still part of our case."

p. 685.) In deciding whether an error of instructional omission was prejudicial, the reviewing court must evaluate "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule*, at pp. 580-581.)

Haven argues the omission of a negligence per se instruction was not prejudicial because the jury heard extensive evidence of building code violations and still found Haven not negligent. This argument, however, entirely begs the question whether the jury would have reached the same result had it been properly instructed on the legal presumption of negligence in the event of a regulatory violation. To be sure, had the jury found, as Haven had argued, that the code violation was not a substantial factor in Oliva's accident, we would agree the omission of a negligence per se instruction would have been harmless. But, having found Haven not negligent without any instructions or insight as to the presumptive effect of a code violation, the jury in its special verdict never reached the question of causation. Given the undisputed evidence the building code sections governing the requirement of a landing had been violated and the conflicting expert opinions on causation, the failure to give a negligence per se instruction was prejudicial.[8]

---

8 In light of our reversal of the judgment, we do not reach Oliva's alternate contention Haven's use of demonstrative exemplars during trial violated Evidence Code section 352.

DISPOSITION

The judgment is reversed, and the matter remanded to the trial court for further proceedings not inconsistent with this opinion. Oliva and Whittier are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.